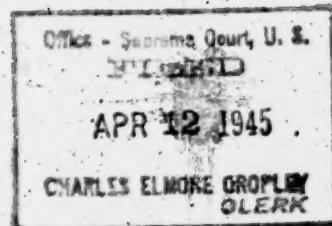


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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 948 36

THE JOHN KELLEY COMPANY,

vs.

*Petitioner,*

COMMISSIONER OF INTERNAL REVENUE

BRIEF IN REPLY TO RESPONDENT'S BRIEF IN  
OPPOSITION

FRANK J. ALBUS,  
*Counsel for Petitioner.*

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The Respondent, in his brief in opposition to the granting of the Petition for Writ of Certiorari in this case, failed completely to point out why the principle announced by this Court in the cases of *Dobson v. Commissioner*, 320 U. S. 489 and *Scottish American Investment Co. v. Commissioner*, 323 U. S. 119 (discussed at Page 9, *et seq.* of Petitioner's original brief), does not sustain the Petitioner in this case. As a matter of fact, there have been a number of decisions of this Court reported subsequent to the preparation of the original brief of the Petitioner which clearly show that the Circuit Court of Appeals for the Seventh Circuit had no authority to reverse the decision of the Tax Court in this case.

Under date of January 29, 1945 this Court decided the case of *W. G. Choate v. Commissioner of Internal Revenue*, No. 93, October term, 1944. In the *Choate* case, the decision of the Tax Court in favor of the taxpayer turned upon its finding of fact that a cash sale of equipment had been made. The Circuit Court of Appeals for the Tenth Circuit reversed the Tax Court. This Court, in holding that the decision of the Tax Court was not reviewable by the Circuit Court of Appeals, said:

"In the second place, the Tax Court found that the parties intended a cash sale of the equipment. That question is argued here as if it were open for re-determination by us. It is not. It is the kind of issue reserved for the Tax Court under *Dohson v. Commissioner*, 320 U. S. 489 and *Wilmington Company v. Helvering*, 316 U. S. 164, 167-168."

It will be noted that the Tax Court found that the parties *intended* a cash sale of the equipment, and that this determination on the part of the Tax Court was not reviewable by the Circuit Court of Appeals. In the instant case, at R. 40, the Tax Court held that by the issuance of the debentures, the holders thereof became creditors of the corporation, and that under the facts in the case, they had the right to change to the creditor-debtor basis. The entire foundation of the decision of the Circuit Court of Appeals is that the holders of the debentures did not become creditors of the corporation—a conclusion directly opposite to the conclusion reached by the Tax Court.

Under date of March 5, 1945, this Court decided the case of *Commissioner v. Wemyss*, No. 629, October term, 1944. In this case, the Tax Court had held that the full value of stock transferred to the prospective wife of the donor, in order to compensate her against the loss of her interest in a trust should she marry the donor, was subject to the gift

tax. The Circuit Court of Appeals for the Sixth Circuit reversed the Tax Court and held that there was no "donative intent". This Court, in holding that the Circuit Court of Appeals had no authority to reverse the Tax Court, said:

"The Tax Court in effect found the transfer of the stock to Mrs. More was not made at arm's length in the ordinary course of business. It noted that the inducement was marriage, took account of the discrepancy between what she got and what she gave up, and also of the benefit that her marriage settlement brought to her son. These were considerations the Tax Court could justifiably heed, and heeding, decide as it did. Its conclusion on the issue before it was no less to be respected than were the issues which we deemed it was entitled to decide as it did in *Dobson v. Commissioner*, 320 U. S. 489 (31 AFTR 773), *Commissioner v. Heininger*, 320 U. S. 467 (31 AFTR 783), *Commissioner v. Scottish American Co.*, 323 U. S. 119 (Paragraph 72,005 1945 Fed.)".

In the instant case, the Tax Court found that the issuance of the bonds was an arms-length transaction in the ordinary course of business. The Circuit Court of Appeals ignored this holding, and concluded that the issuance of the bonds was merely "accounting hocus-pocus" (R. 59). The decision of this Court in the *Wemyss* case clearly shows that the holding of the Tax Court in the instant case was final, and that it was not subject to review by the Circuit Court of Appeals.

Under date of March 12, 1945, this Court decided the case of *Commissioner v. Court Holding Company*, No. 581, October term, 1944. The question in this case was whether a certain sale of property had been made by a corporation, or if the sale had been made by the stockholders after the corporation had been "liquidated". The Tax Court held

that the corporation was taxable on the gain. The Circuit Court of Appeals for the Fifth Circuit reversed the Tax Court, and held that the sale had been made by the stockholders. This Court reversed the Circuit Court as I said:

"The answer depends upon whether the findings of the Tax Court that the whole transaction showed a sale by the corporation rather than by the stockholders were final and binding upon the Circuit Court of Appeals."

"The Tax Court concluded from these facts that, despite the declaration of a 'liquidating dividend' followed by the transfers of legal title, the corporation had not abandoned the sales negotiations; that these were mere formalities designed to make the transaction appear to be other than what it was, and thus avoid tax liability. The Circuit Court of Appeals drawing different inferences from the record, held that the corporation had 'called off' the sale, and treated the stockholders' sale as unrelated to the prior negotiations.

"There was evidence to support the findings of the Tax Court, and its findings must therefore be accepted by the courts. Dobson v. Commissioner, 320 U. S. 489 (31 AFTR 773); Commissioner v. Heininger, 320 U. S. 467 (31 AFTR 783); Commissioner v. Scottish American Investment Co., 323 U. S. 119."

The decision of this Court in the *Court Holding Company* case again clearly shows that the Seventh Circuit had no authority to reverse the Tax Court in the instant case.

It is interesting to note how the Commissioner of Internal Revenue can vacillate in his arguments, depending upon which side of a particular case he happens to be on. No better statement of the position which the Petitioner in the instant case is taking could be made than that made by the Commissioner of Internal Revenue at Pages 11 and 12 and also Page 16 of his brief before this Court in the case of

*Commissioner of Internal Revenue v. Court Holding Company*, No. 581, October term, 1944, decided March 12, 1945. On the other hand, the Petitioner would be willing to accept as its argument in the instant case the position which the Commissioner of Internal Revenue took at Pages 25 and 26 of his brief in the case of *Commissioner of Internal Revenue v. William H. Wemyss*, No. 629, October term, 1944, decided March 5, 1945. Certainly it was never intended that the principle of the *Dobson* case and the *Scottish-American Investment Company* case was to apply only to those cases where the Circuit Court of Appeals reverses a decision of the Tax Court that was in favor of the Government. This is clearly borne out by the fact that in both of these cases, the decisions of the Tax Court were in favor of the taxpayers, and this Court held that the Circuit Courts of Appeals were in error in reversing the decisions of the Tax Court.

The Tax Court in the instant case held that by the issuance of the bonds, the holders thereof intended to and did become creditors of the corporation, and in accordance with the very arguments which the Commissioner of Internal Revenue made in the briefs referred to above, the decision of the Tax Court in this respect was final.

WHEREFORE, it is respectfully submitted that the Petition for Writ of Certiorari in the instant case should be granted, and that the decision of the Seventh Circuit should be reversed.

Respectfully submitted,

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